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IN THE

Supreme Court of the United States

OCTOBER TERM 1946. No. 52

ARCH R. EVERSON,

Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING ET AL.,

Appellees.

BRIEF *AMICI CURIAE* OF NATIONAL COUNCIL OF CATHOLIC MEN and NATIONAL COUNCIL OF CATHOLIC WOMEN

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BRIEF *AMICI CURIAE* OF NATIONAL COUNCIL OF CATHOLIC MEN and NATIONAL COUNCIL OF CATHOLIC WOMEN

Statement of Interest

This brief is filed with the consent of both parties.

The National Council of Catholic Men and the National Council of Catholic Women are nonprofit organizations incorporated under the laws of the District of Columbia. These national organizations are federations of Catholic associations of men and women.

Many Catholic parents are directly affected by the present controversy since they were joined as defendants in the action.

Moreover, if the attack on the New Jersey statute should be successful, the consequences would be a hardship imposed upon children who attend parochial schools in many States and upon their parents who are compelled by law to get their children to school or to suffer penal consequences.

It is, therefore, in the broad interests of parental and child welfare in many regions in the United States, particularly in rural regions, that the National Council of Catholic Men and the National Council of Catholic Women submit this brief.

Facts

Prior to 1941 the State of New Jersey by Section 18:14-8 of its Revised Statutes provided transportation for school children living remote from the public schoolhouses of their attendance. By Chapter 191, Laws of 1941, this Statute was amended to include among the school children so to be transported children attending non-profit schools other than public schools.

On the authority of this law the Board of Education of the Township of Ewing, County of Mercer, adopted a resolution providing transportation of its school children for the year 1942-1943. In conformity with the resolution $357.74 was spent to defray transportation costs of twenty-one pupils from the Township attending non-profit parochial schools in Trenton, New Jersey.

Everson, a taxpayer of Ewing, sued to set aside the resolution. Substantially his claim was that the underlying statute offended the Constitution of the State of New Jersey and the Constitution of the United States. The highest court of the State of New Jersey sustained the law. That Court, construing the act, held (1) that the transportation of school children attending non-profit private schools was authorized as incidental to the trans-

portation of public school children similarly situated; and (2) that the Legislation amounted to an integral element in the State policy of compulsory education and dealt with a public matter specifically because it was in aid of parents obliged by law to cause their children to attend school; parents who, but for such free transportation, would often be unable to satisfy the requirements of the compulsory education statutes.

Of course compulsory education statutes do not operate solely on parents choosing public schools for their children.

The Question

The sole question presented by this appeal is whether the Act as thus construed by the highest court of the State of New Jersey must fall by reason of the Fourteenth Amendment to the Federal Constitution viewed either in its primary text or in its meaning after absorption of the First Amendment.

Summary of Argument

I.

The purpose of the law is a public purpose from a tax standpoint and is in no sense condemned by the rule of *Loan Association* v. *Topeka*, 20 Wall. 655.

II.

With regard to the Federal Constitution the policy of a State toward schools within its borders reflects merely a design of history and does not spring from inherent constitutional necessity.

III.

Non-profit private schools including such schools as are conducted under denominational auspices fulfill a public function in every State of the Union. Aid to them if given on a non-discriminatory basis by the State as part of its educational policy is not offensive to the Fourteenth Amendment to the Federal Constitution.

IV.

Laws granting public incidental aid on a non-discriminatory basis to non-profit private schools including such schools as are conducted under denominational auspices are not laws "respecting an establishment of religion."

V.

The "Wall of Separation" between Church and State is not undermined, breached or cracked by this Transportation Law. Abandoning metaphor, if this law be deemed to aid parochial schools it nevertheless does not offend the First Amendment because that amendment though negativing a State Church and coercive activity directed against conscience does not deny to the forty-eight States power to serve their own legitimate educational interests in their citizens as citizens.

VI.

Conclusion

POINT I

The purpose of the law is a public purpose from a tax standpoint and is in no sense condemned by the rule of *Loan Association* v. *Topeka*, 20 Wall. 655.

Prior to 1941 public money was appropriated by New Jersey for free transportation of public school children living remote from their schoolhouses. The State evidently had the right to appropriate public money for that purpose. Nobody in this litigation questions that right. The effect of the 1941 amendment was to expand the class of direct beneficiaries of such free transportation. In contrast with the original text the amended text of the law makes no distinction between parents sending their children to non-profit private schools and parents sending their children to public schools. As all parents are subject to the same penal statutes respecting compulsory education, so all parents are made eligible for help in obeying these statutes.

The expansion of the Law in 1941 seems to meet the requirements stated by Mr. Justice Field that the Fourteenth Amendment "* * * undoubtedly intended * * * that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, * * *" (*Barbier* v. *Connolly*, 113 U. S. 27, 31).

Every parent has the right to choose the school his child shall attend. However, he must choose some school. And if he neglects to do so, the State, as *parens patriae*, will (save in a few immaterial and exceptional cases) compel him to choose a school and send his child to it; other-

wise the State will impose the statutory penalities. When the choice of a school has been made, if it is a public purpose to aid by free transportation parents who have selected public schools for their children, it is no less a public purpose to aid parents who have selected non-profit private schools.

Concededly when the State appropriates public money commercially to subsidize a private person or business its action is an abuse of the taxing power; clearly this is deprivation of property without due process of law. The principle in question is too well established to require extensive citation to authority. It was early formulated in *Loan Association* v. *Topeka* (20 Wall. 655). 'The holding of that case was briefly indicated by this Court in *Cole* v. *LaGrange*, 113 U. S. 1, 6, where the Court said:

> "In Loan Association v. Topeka, 20 Wall. 655, bonds of a city, issued, as appeared on their face, pursuant to an act of the legislature of Kansas to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this Court to be void, even in the hands of a purchaser in good faith and for value."

The purpose, scope and effect of the present law are wholly different from the purpose, scope and effect of private purpose legislation. If one keeps to the authoritative construction of the challenged statute—the construction given the law by the highest court of New Jersey—this legislation is seen to be essentially an exercise by the State of its police power and incidentally an exercise of its taxing power. Either power may be exerted "* * * not only for the public health, the public morals and the public safety, but for the general or common good, for the well being, comfort and good order of the people. The enactments of a State, when exerting its power for such purposes, must be respected by this Court, if they do not violate rights granted or secured

by the Supreme Law of the land" (*Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363). Is it reasonable to hold unconstitutional a statute intended to aid parents to fulfill the requirements of a penal statute? If it is, then all such free transportation of school children is unconstitutional regardless of the schools they attend.

The presentation in this cause of the claim that public money is here appropriated to private purposes seems to arise from a transposition of the adjective "private" from its place as a qualifier of "schools" to an unsuitable position as a qualifier of "purposes". The word "private" is merely descriptive of schools other than public schools. However, the purpose of the private school, no less than that of the public school, is a public purpose, namely education. In this respect the present case is within the rule of *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370.

To qualify for the aid the schools must be non-profit organizations. They do not profit from the supposed assistance except in the measure that in all public expenditures the money spent necessarily comes to some private hand. Does the Federal Constitution render the State powerless to aid private institutions fulfilling public purposes? If it does, then aid to private hospitals, orphanages and the like must be struck down. But this conclusion is palpably absurd.

Not even the very old State cases of *Jenkins* v. *Andover*, 103 Mass. 94, and *Curtis's Adm'r.* v. *Whipple and others*, 24 Wis. 350, both of which were decided in 1869, would support such view. Each of these cases dealt with the propriety of direct application of tax money in aid of a single and wholly private school. In the Massachusetts case $25,000 in public money had been appropriated to rebuild a school destroyed by fire. The school had been built originally by means of money derived from a bequest

under a Will. The appropriation of public money for the purpose described was denied validity because the Constitution of the Commonwealth of Massachusetts expressly prohibited raising money by taxation for any school other than the common schools of that Commonwealth.

The Wisconsin case seems to be of like effect. Moreover the Court was careful to point out that no direct public benefit could be found in the case before it. The Court however noted (p. 355) that:

> "Any direct public benefit or interest of this nature (i. e. subserving the peace, good order or welfare of society), no matter how slight, as distinguished from those public benefits or interests incidentally arising from the employment or business of private individuals, or corporations, will undoubtedly sustain a tax."

In the Massachusetts and Wisconsin cases the schools involved were held in point of fact to be enterprises no less private than the manufacturing establishment whose intended benefit from taxation was considered to be unconstitutional in *Loan Association* v. *Topeka*.

In the present instance, however, if non-profit private schools as a class are to be deemed incidentally benefited by the bus law it should be observed that their private quality exists only in a highly restricted sense. Such schools are subject at many turns to State control. They also make possible parental compliance with compulsory attendance laws. In point of fact such schools today are an integral element in the complete American system for educating the masses of American children—a fact to be made more apparent by discussion hereinafter (cf. *infra* Point III).

POINT II

With regard to the Federal Constitution the policy of a State toward schools within its borders reflects merely a design of history and does not spring from inherent constitutional necessity.

There runs through the thinking of Appellant, tacitly perhaps, but as a fundamental principle, the belief that public schools as now existing in the State of New Jersey and elsewhere somehow exist by inherent constitutional necessity. This is an erroneous idea.

It was long ago established and is not now open to question (if we are to act in continuity with our national past) that no person as against the State has an inalienable right to an education. The State therefore is not required by any principle inherent in Government to take measures systematically to provide education for its children. In short the very existence of public education is simply an adventitious historical occurrence. It springs from a free choice made by the people of the various States. It is the creature of positive law. *Gong Lum* v. *Rice*, 275 U. S. 78; *Hall* v. *DeCuir*, 95 U. S. 485, 504; *People* v. *Easton*, 13 Abb. Pr. N. S. (New York) 159; *People ex rel. Cisco* v. *School District*, 161 N. Y. 598; *People ex rel. King* v. *Gallagher*, 93 N. Y. 438; *Dallas* v. *Fosdick*, 40 How. Pr. (New York) 249; *Matter of Walters*, 84 Hun 457; *Bissel* v. *Davison*, 65 Conn. 183. The cited cases clearly show not only that the existence of the system is a matter of State discretion but also that the system itself, once it exists, may be regulated as each State sees fit subject to rights secured by the Bill of Rights; rights recently illustrated by *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

As was stated in *Dallas* v. *Fosdick* (*supra*) at page 251:

> "The right to be educated in the common schools of the state, is one derived entirely from the legisla-

tion of the state; and as such, it has at all times been subject to such restrictions and qualifications as the legislature have from time to time deemed it proper to impose upon its enjoyment."

This Court further noted that (p. 253):

"* * * the right which it (the law) secured was derived from and conferred by the law, and it was liable to be modified and changed by the same authority that had made the law. And since *the power of the legislature over the subject was complete and ample, it could in the exercise of that power, either repeal the law, and thereby defeat the right altogether, or change and qualify it* * * *." (Italics supplied.)

It is common practice in the public school system of today to segregate the children in accordance with age, sex, ability and color. So long as segregation does not defeat the demand that no person and no class shall be denied equal protection of the laws and so long as other rights secured by the Bill of Rights are not violated, the particular State, actuated by considerations of public welfare, may use any principle of classification, segregation and curriculum making it may choose. Speaking of the system in New York, the highest Court there in *People ex rel. Cisco* v. *School Board* (*supra*) states (p. 602) that there is nothing in the Constitution of New York State

"* * * which prevented the Legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether it relates to separate classes as determined *by nationality, color or ability, so long as it provides for all alike* in the character and extent of the education which it furnished and the facilities for its acquirement." (Italics supplied.)

In *Gong Lum* v. *Rice* (*supra*) the Court speaking by Chief Justice Taft said (p. 85):

> "The right and power of the State to regulate the method of providing for the education of its youth at public expense is clear."

See also *Waugh* v. *Mississippi University*, 237 U. S. 589.

The view that the existence and the form of systems of public education are matters left wholly to the discretion of the individual State gains confirmation from the attempt nine times made up to 1929 to get an amendment to the Federal Constitution requiring all States to establish and maintain systems of public schools for all children between ages 6 to 16 (See Musmanno: Proposed Amendments to the Constitution, p. 182; House Document 551, 70th Congress, 2nd Session).

Before the public school system of education was inaugurated there had already grown up likewise as a matter of historical choice an older body of non-profit private schools many of which were under denominational auspices. Both groups of schools provide substantially the same course of study. Non-profit private schools under denominational auspices also include in their curricula formal religious instruction.

These latter schools do indeed enjoy the measure of autonomy that is due them by reason of their origin from a source (*i. e.*, parental rights) independent of State legislation. However, they acknowledge a responsibility to the State inasmuch as they train its citizens, and they do not claim to be inaccessible to the power of the State in so far as the regulation of schools is integral to the protection of the public welfare. For example, truancy laws apply with equal obligation to private school pupils as to public school pupils.* And truancy on the part of private

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* The extent and variability of State control and supervision of non-profit private schools are indicated by Table 2 printed at page 42 of 24 National Education Association Research Bulletin (No. 1) February 1946.

school pupils is not excused simply because the administrators of such schools might excuse it. Again private school children may not be indoctrinated with ideas or trained in practices inimical to the public welfare, nor may their instruction fall below certain minimal standards. The interest of the State in such schools is present strongly enough to protect the children from deviation in any of these respects, for in so protecting its children the State protects itself.

The educational scene as it exists factually comes to this: Answering to varied needs experienced and various rights enjoyed in American society both public and non-profit private schools emerged in significant numbers in the first half of the Nineteenth Century and both exist in strength today. Historical choice created and fashioned them in the forms in which we now know them. Today they stand side by side fulfilling public need.

If one seeks for a guide to the meaning of the Federal Constitution as it bears on State legislation affecting the two groups of schools it will be found in the fact that in neither type of school may any practice be permitted which infringes constitutional rights secured to the people by the Federal Constitution (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624; *Gong Lum* v. *Rice*, 275 U. S. 78, 85). With these rights secured, however, the Federal Constitution has no concern with what the State chooses to do in carrying to fruition its broad public interest in education.

During the war it was notable that in training nurses in hospitals and military men in schools Congress did not discriminate between public and private hospitals or between public and private schools. The action Congress took in making provision for such training was based on a realistic appreciation of our national resources. Congress realized that some hospitals were public and others private and that some of the latter were under religious

auspices. It noted comparable facts with regard to schools. It then utilized all resources with evenhanded and grateful impartiality in its national program for rapid development of the indispensable skills of which this nation stood in urgent need. The circumstance that a hospital or a school was found to be under denominational auspices was deemed immaterial. That circumstance did not deprive the hospital of the character of hospital or the school of the character of school.

It is to be doubted that this Congressional action was unconstitutional. If it was not unconstitutional what Federal reason would suggest itself to nullify decision of a State to bring within the scope of its active interest non-profit private schools as well as public schools and use both types of schools as equally legitimate means for achieving its educational aims?

The presence or absence of religious instruction in non-profit private schools could well appear in the eyes of the State as an immaterial element in relation to the State's aim. Likewise immaterial is the private or public character of "control" of such schools, provided always, that such control does not (and it does not) imply withdrawal of the schools from the range of regulation necessary to assure proper compliance with the over-all program of compulsory education or proper application of any aid to the schools the State might determine to supply.

POINT III

Non-profit private schools including such schools as are conducted under denominational auspices fulfill a public function in every State of the Union. Aid to them if given by the State on a non-discriminatory basis as part of its educational policy is not offensive to the Fourteenth Amendment to the Federal Constitution.

For the sake of the argument let it be assumed that the New Jersey bus law gives aid incidentally to the non-profit private schools although in point of fact it is established by the Court of New Jersey that this assumption is unsound.

The State has sovereign power to watch over the welfare of all persons under disability especially where the disability arises from infancy. This is axiomatic. The State exercises this sovereign power extensively and continuously. Because this power as exerted in favor of minors guards them against crippling dangers from which maturity is the only substitutionary protection, Courts rarely interfere with its exercise. How far State activity may go in legislating for the protection of minors is illustrated by the recent decision of *Prince* v. *Massachusetts*, 321 U. S. 158. The Court there said that while it is serious enough when the State enters into conflict with a parent over control of a child when only secular matters are concerned the situation becomes still more serious when an element of religious conviction is present. The court fully appreciated the strength of the parent's protest against State control of his child when this protest was based on an appeal both to his parental rights and to his rights of conscience; nevertheless the Court sustained the controlling arm of the State as against the parental protest. It stated that "A democratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with

all that implies. It may secure them against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the State's police power, whether against the parent's claimed control of the child or one that religious scruples dictate contrary action."

In the cited case it is notable that though three opinions were written and the case was decided on a 5 to 4 basis, the whole Court was evidently of the opinion that a State in its role as *parens patriae* might make any reasonable law designed to fulfill its obligations particularly respecting the welfare of children. The division was on the question whether the particular regulation was reasonable. Thus, Mr. Justice Murphy, dissenting, said (p. 172) that religious training and activity performed by a child would be protected against State interference "* * * except in so far as they violate reasonable regulations adopted for the protection of the public health, morals and welfare." And he further noted that (p. 173) "* * * the power of the State lawfully to control the religious and other activities of children is greater than its power over similar activities of adults * * *." In like manner the dissenting opinion of Mr. Justice Jackson, in which Justices Frankfurter and Roberts concurred, makes it clear that in his judgment the State in the interest of its minor citizens has extensive powers to make reasonable regulations calculated to protect them from harm.

The Court interferes so rarely in the area of legislative activity touching infants that when interference in fact occurs it must be because the power of the State as *parens patriae* has unreasonably collided with rights, the roots of which are exceptionally deep. And when, for in-

stance, the rights of parents are upheld against the authority of the State strong light is shed on the importance of these parental rights.

This is what confers special interest on the holding of this Court in *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535. There the Court held that an effort by a State, believed by the State to be in the interest of its children, to compel attendance at public schools to the exclusion of all private schools must be thwarted because as the Court said:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Two cardinal ideas emerge from the quoted text. First, standardization of children is not the objective of our constitutionally organized society. This principle has been lately restated by the Court in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 641, where Mr. Justice Jackson remarked:

> "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

To standardize children is not and never has been congenial to American constitutional, political or social principles. This is the first cardinal idea.

Secondly, American tradition is intrinsically against standardization because it insists that the rising genera-

tion must not fall into the grasp of State omnipotence. The American child is not primarily the child of the State. Primarily it is the child of the parents. Parental rights and duties and the corresponding filial duties and rights spring from nature, are antecedent to Government and rise superior to the rights of the State. Such is the second of the cardinal ideas contained in *Pierce* v. *Sisters.* This right of the parent over the education of his child lies squarely at the root of the whole system of non-profit private schools and justifies their genesis and character.

This "private" system exists not for profit but for the public welfare. These schools are not stock corporations organized for profit. They are commonly free schools. For the indigent they are always free. Operating for the public welfare, none of their supervisors, teachers or pupils gains benefits of a private-profit character. The whole benefit of a non-profit private school system, regulated in material respects by the State, is a public benefit. The State has an interest in such schools not only strong enough to support its regulatory activities but strong enough, correlatively, to sustain such reasonable contributions to the well-being of the system as will serve to protect or enhance the public benefits arising from and justifying its existence.

From the constitutional standpoint, therefore, as well as from the historical and sociological standpoints, it is a mistake to consider non-profit private schools including denominational schools to be as inferior in status to the public schools. It is a mistake to think of the former as existing *de facto* in contrast with the latter assumed to exist *de jure.* It is to speak in an invidious idiom to call non-profit private schools "protest schools" and to refer to their pupils as "withdrawal pupils". That the non-profit private school system expresses the deep-seated life convictions of minorities gives no warrant for classifying that system as beyond the constitutional pale.

Indeed the degree of liberality in the public treatment of minorities best measures the strength of the freedoms secured to minorities by the Constitution.

That the appellant conceives the non-profit private school to be a "protest school" as that expression is sometimes used appears from his statement (brief p. 25) that "the sending of children to private schools, whether religious or nonsectarian, is an excuse for not utilizing the public facilities afforded by the State * * *." And again he says (brief p. 26) "The exemption thus afforded is because the parents are ready, willing and able to send their children to private schools and to the particular school of their own choice." If a parent is regarded as needing an exemption or an excuse before sending his child to a non-profit private school, it is implied that somehow the original and sole right to provide education for children rests with the State. This reasoning cannot be reconciled with the principle stated by *Pierce* v. *Society of Sisters (supra)*, and more recently by this Court in *Prince* v. *Massachusetts*. The parental right to control the education of a child is the original right while that of a State is derivative.

On the other hand it is to be noted that these schools are in no small measure subject to public control. States commonly make laws touching them. These laws impose standards to be satisfied by the teachers, require regularity of attendance, fix the duration of the school year and prescribe courses of study. Such schools, thus regulated by public authority, year after year graduate to the general community thousands of pupils who in due course take their places as citizens, soldiers, taxpayers, business men, parents and voters. In brief, these graduates of non-profit private schools take up obediently the discharge of all duties proper to citizens and they also rightfully claim to enjoy all rights appertaining to citizens.

While it is true that in recent years some of the States have been neutral or unfriendly to non-profit private schools, that neutrality or hostility has been a matter of purely State policy, often embodied in the State constitutions. These constitutions not infrequently contain specific restrictions on State aid to non-profit private schools, especially those under the auspices of a religious denomination.

However the Federal Constitution has never been deemed to require any such discrimination against non-profit private schools. In fact, the Blaine proposal for a constitutional amendment was considered necessary in order to supply a constitutional basis, otherwise lacking for such discrimination.

As submitted to the Senate August 14, 1876 it contained the following text (4 Congressional Record, pt. 6, p. 5580):

> "No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; * * *."

The proposed amendment of which the quoted text is a part also contains the statement that

> "No State shall make any law respecting an establishment of religion * * *."

And this proposed amendment according to House Document 551 of the Seventieth Congress, Second Section, (§ 72) since 1875

> "• • • has been re-introduced twenty times, but only once reported on by the committee to which referred, which report recommended that the resolution do not pass."

The Blaine amendment and its subsequent history evidence the non-existence of any Federal constitutional prohibition of aid to non-profit private schools. The indications of this evidence are confirmed by the decisions of this Court. This Court has shown directly and by implication that we have no national principle inimical to the non-profit private school system. Its right to exist *de jure*, its status as an instrumentality for giving expression to natural parental rights and its utility within the National framework of education—all these principles have been recognized by the decisions of this Court. (*Pierce* v. *Society* of Sisters, 268 U. S. 510; *Meyer* v. *Nebraska*, 262 U. S. 390; *Quick Bear* v. *Leupp*, 210 U. S. 50; *Prince* v. *Massachusetts*, 321 U. S. 158; *Farrington* v. *Tokushige*, 273 U. S. 284.)

It is a fair conclusion to say that *in the Federal perspective* the non-profit private schools and the public schools may be regarded as branches of an over-all prevailing system of general education. In the welfare of that system viewed in its totality the State has, because it must have, a profound interest. For the State to aid one branch of the system as well as the other cannot but serve the public welfare, health, morality, good order and best interests of the community since educational institutions reach to the nerve of society and decide more than any other environmental element the shape of things to come.

From the standpoint of the Federal Constitution therefore there is no basis for prohibiting incidental public aid

to non-profit private schools unless such incidental aid must be discountenanced on the ground that laws supplying it are laws "respecting an establishment of religion." To this possibility consideration may now be given.

POINT IV

Laws granting public incidental aid on a non-discriminatory basis to non-profit private schools including such schools as are conducted under denominational auspices are not laws "respecting an establishment of religion".

A school does not lose the character of a school by virtue of teaching moral principle and religious truth. Certainly denominational schools and particular churches bear relations to one another. But relationship and substantive identity are very unlike one another.

Religion, regarded simply as religion, appears in organized form as church—its creed, cult and rites. In point of fact there are a multitude of "religions" or churches in the American scene. Their plurality is a consequence of longstanding differences in religious belief.

"An establishment of religion" implies that public authority assumes "a guardianship of the public mind" (*Thomas* v. *Collins*, 323 U. S. 516, 545) in consequence of the choice of some particular religion as the official State religion. A real establishment of religion could not occur unless the State singled out one particular church for special public recognition and at the same time denied equal juridical status to other existing churches.

If one particular church be not selected as the instrument for guardianship of the public mind then none is chosen. So far as the State is concerned, "in this field every person must be his own watchman for truth because the forefathers did not trust any government to separate the true from the false for us. *West Virginia State Board*

of Education v. *Barnette*, 319 U. S. 625," (*Thomas* v. *Collins, supra*, at page 545.)

Public authority in the American concept of government does not and cannot enter the pluralistic world of organized believers who as believers give visible form to their respective churches. Public authority can and does take cognizance of the existence of the various churches and adopts measures to restrain such manifestations of organized religion as are offensive to the public judgment in the matter of morality *e. g.*, polygamy. At the same time public authority takes positive steps in a general way to encourage all religions without however tampering with the various forms of sovereignty present within the respective churches.

Religious education, understood as meaning what actually goes on in schools under religious auspices, is decidedly different from religion as religion. The citizen is present in the school as prominently as is the believer. There the child is prepared for his civic status and responsibility as well as for legitimate religious objectives essential to his complete well-being.

In the measure that the child *as citizen* is in the denominational school he is within the reach of public authority. This fact is recognized and acted upon by the State at many points. From the standpoint of public authority the circumstance that a child while gaining his education as a citizen is likewise receiving instruction in religion is immaterial. The State cares nothing about the content of that religious instruction provided it is within the confines of permissible expression as measured by the requirements of public morality.

But the State does care deeply about its child citizen and his education. It would confess to a strange and unintelligible impotence if it felt itself obliged to deny its aid to a child citizen merely because in course of his education he also learns religious beliefs. In effect the

State would be confessing itself obliged to treat these children as second class citizens; citizens of inferior standing. This impotence to aid them would create inequalities in the treatment of children in consequence of their religious beliefs.

In *Chance et al.* v. *Mississippi State Textbook Rating and Purchasing Board*, 190 Miss. 453, though the case dealt with a State constitution remarks were made by the Court so apt to the present point that they deserve to be mentioned at length. The Court said (pp. 467-468):

> "Useful citizenship is a product and a servant of both the church and the state, and the citizen's freedom must include the right to acknowledge the rights and benefits of each, and to import into each the ideals and training of the other.
>
> There is no requirement that the church should be a liability to those of its citizenship who are at the same time citizens of the state, and entitled to privileges and benefits as such. Nor is there any requirement that the state should be godless or should ignore the privileges and benefits of the church. Indeed, the state has made historical acknowledgment and daily legislative admission of a mutual dependence one upon the other.
>
> It is the control of one over the other that our Constitution forbids. Sections 18, 208. The recognition by each of the isolation and influence of the other remains as one of the duties and liberties, respectively, of the individual citizen. It is not amiss to observe that by too many of our citizens the political separation of church and state is misconstrued as indicating an incompatibility between their respective manifestations, religion and politics. The state has a duty to respect the independent sovereignty of the church as such; it has also the duty to exercise vigilance to discharge its obligation to those who, although subject to its control, are also objects of its

bounty and care, and who regardless of any other affiliation are primarily wards of the state. The constitutional barrier which protects each against invasion by the other must not be so high that the state, in discharging its obligation as parens patriae, cannot surmount distinctions which, viewing the citizen as a component unit of the state, become irrelevant.

The religion to which children of school age adhere is not subject to control by the state; but the children themselves are subject to its control. If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not, because of his exercise of this right, proscribe him from benefits common to all."

The distinction between schools where religion is taught and the establishment of religion was noted by the Solicitor General of the United States, Henry Martyn Hoyt, in the argument he presented in *Quick Bear* v. *Leupp*, 210 U. S. 50. The Solicitor General said (p. 74):

"The Constitution provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' A religious establishment, however, is not synonymous with an establishment of religion. See Bradfield v. Roberts, 175 U. S. 291, upholding an appropriation for a Roman Catholic hospital. A school, like a hospital, is neither an establishment of religion nor a religious establishment, although along with secular education there might be, as there commonly is, instruction in

morality and religion, just as in a hospital there would be religious ministrations."

When are laws to be regarded as laws respecting "an establishment of religion"? The antecedents of that constitutional expression are ready to hand by reason of the research of Mr. Justice Reed reported in his opinion, dissenting (but not on this score) from the majority of the Court, in *Murdock* v. *Pennsylvania*, 319 U. S. 105, 124-125. It is there shown that the House originally proposed the following text for the First Amendment to the Constitution:

"Congress shall make no law establishing religion * * *."

In the Senate the text assumed this form:

"Congress shall make no law establishing articles of faith, or a mode of worship * * *."

And Mr. Madison said (according to Mr. Justice Reed):

"* * * that he apprehended the meaning of the words on religion to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."

The text as ultimately ratified is cast in language technically associated with the creation and maintenance of a formal State Church. This language moreover specifically imports the English State Church System which then was known and is still known as The Establishment.* This use of the word "establishment" to denote The

* That it was not every establishment but a special kind of national establishment of religion which was thought offensive readily appears from the fact that several States ratifying the First Amendment then had and for years thereafter continued to have their respective forms of establishments of religion. (*Cf. Cobb, S. H., The Rise of Religious Liberty in America, New York, The Macmillan Company*, 1902, pp. 507, 510, 512.)

Establishment, in familiar use at the time our present political society was founded persists in modern England. To illustrate: In The Concise Oxford Dictionary, Third Edition, the definition of the word establishment opens this way:

> "Establishing; Church E., The E., church system established by law; * * *"

In the Third Edition of Black's Handbook on American Constitutional Law, it is said that (p. 518)

> "Establishment of Religion is Forbidden: * * * A church is by law 'established' in a state when it is an institution of the state, under the direct protection and patronage of the state, to the exclusion of other churches or sects, when it is supported by general and public taxation, when its laws, ordinances, and doctrines are a part of the municipal law of the state, so that persons may be punished by the civil authorities for disobedience of them, and when its chief officers are officers of the state or appointed by the civil authorities."

Black's text gives the historical content of "The Establishment". The text of the First Amendment was designed to prohibit Congress from making any laws setting up an establishment of religion on the style of The Establishment.

The Blaine Amendment (*supra*, pp. 19-20) and its history considered in relation to actual practices of the Congress in providing aid to schools under denominational auspices and in dealing directly with hospitals and schools likewise under denominational auspices, show clearly that laws such as the New Jersey Bus Law have never been thought to contain the character of laws "respecting an establishment of religion."

The Appellant apparently desires this Court to make a construction of the First Amendment text wholly independent of historicity. Using canons of constitutional

construction devoid of every mark of objectivity save that of avoiding flagrantly spurious word meanings appellant seeks to construe the word "respecting", employed by the First Amendment, as meaning "glancing at" and the words "an establishment of religion" as descriptive of any religious establishment. Guided by this method of construction he then argues in substance that any law chargeable with barely noticing a religious establishment must be held unconstitutional.

The path of construction sketched above hardly shows "• • • the precision necessary to postulates of judicial reasoning" (*West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 636). It would require first a denial of all historical meaning inhering in the language of the First Amendment. It would thereafter necessitate direct repudiation of the Court's observation in *Bradfield* v. *Roberts*, 175 U. S. 291, that a religious establishment and an establishment of religion are different things. Moreover if the Court were to adopt the appellant's method of construction it would also be led logically to reject its own views in the Selective Service Cases (*Arver* v. *U. S.*, 245 U. S. 366, 389-390) where it was held to be *evidently* unsound to claim that an Act of Congress exempting ministers of religion from military service was an Act respecting an establishment of religion.

Consider the various stages in the thinking which would start with a simple bus law and conclude that it is a law respecting an establishment of religion. They are somewhat as follows:

1. On its face this law looks solely to transportation of all children living remote from school. The law is a State effort in aid of smooth execution of its compulsory school attendance policy. The law makes no special provision favorable to non-profit private school children but merely provides for them the same instrumentalities of transportation as are already at the disposal of public school children.

2. But it is a law authorizing transportation of parochial school children because they come within the class of non-profit private school children.

3. And when such children get off the bus they study not only reading, writing and arithmetic but their catechism as well.

4. Such children then are learning the Articles of a Faith and but for the bus carrying them to school they might not be undergoing such instruction since, by hypothesis, they might not have been "withdrawn" from the public schools and hence might be in the public schools, where no formal religious instruction is given.

5. In the alternative: If such children had been transported to the parochial school at private expense, the money spent on bus fares would not have been available for different purposes, that is, in aid of other parochial objectives. (This argument assumes either (a) that the cost of transportation would be borne directly by the parish treasury, for which there is no support in the record, or (b) that a parent who has to spend twenty cents bus fare to send his child to a parochial school will put that much less in the collection plate on Sunday.)

6. Such parochial objectives might not be coextensive with educational pursuits.

7. They might for example, embrace the payment of a curate's salary or the cost of repairing a church roof.

8. A law which as shown in proposition No. 4 encourages "withdrawal" of children from public schools or as indicated by proposition No. 5 releases parochial funds is a law giving aid to a parochial school and implicates possibilities of proposition 7.

9. A parochial school is identical with a particular church.

10. A particular church is a religious establishment.

11. A religious establishment is an establishment of religion.

12. Therefore, since it is forbidden that any law respecting an establishment of religion shall be enacted it follows from proposition Nos. 9, 10 and 11 that the condition of affairs formulated in proposition No. 1 must be pronounced illegitimate.

Does it not seem that to glide in that manner by a process of uncritical associationism is a form of reasoning which, though picturesque, lacks sinews? Is it not in the order of that kind of over-simplification which, in the words of Mr. Justice Jackson "lacks the precision necessary to postulates of judicial reasoning"?

Actually laws taking cognizance of the existence and operation of religious bodies in the community are not unconstitutional as the Selective Service cases show. Laws "• • • aiding with equal attention the votaries of every sect to perform their own religious duties • • •" (*Terrett* v. *Taylor*, 13 U. S. 43, 49) would not be unconstitutional. Laws exempting religious bodies from taxation on a basis of impartial treatment of all sects are not unconstitutional. All these laws operate directly on existing religious establishments—they necessarily so act—and yet they are not laws "respecting an establishment of religion". They are laws which to use an old distinction "encourage" religion; but laws which "encourage" religion are something very different from laws which "ordain and establish" it (See *Tiffany, Joel*, on Government and Constitutional Law [1867] p. 393).

If a *noli me tangere* principle is not the constitutional principle governing laws directly concerned with actual religious establishments, then by what extension of the "establishment of religion" aspect of the First Amendment could that amendment be brought to bear on this bus law? The law makes no mention of religion and contains no trace of either religious discrimination or religious

establishment. So far as the legislative intention is concerned, it is ancillary to, and co-extensive with, the compulsory school attendance laws of the State. Its purpose is nothing more than the efficient solution of a practical space difficulty involved in getting all children promptly and safely to all schools.

This Court has given expression many times to broad and exalted views on the subject of religious liberty and upon the position such liberty holds in our society. Religious liberty is "* * * that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles." (*Watson* v. *Jones*, 80 U. S. 679, 728). It is a freedom "* * * available to all, not merely to those who can pay their own way" (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 111). As one of the freedoms secured by the First Amendment it has a "* * * preferred place * * * in our scheme * * *" (*Thomas* v. *Collins*, 323 U. S. 516, 530). Such religious freedom it has been "repeatedly held" is immune to effective sabotage by the State (*Douglas* v. *Jeannette*, 319 U. S. 157, 162).

In addition to affording civic training non-profit schools which chance to be parochial schools give an institutional expression to some forms of religious belief and practice. They are the organic result of the collective convictions of many individuals. Therefore destructive action taken against the parochial school system—a system concededly productive of great good in our pluralistic society—would today be struck down by this Court not merely on the basis stated in *Pierce* v. *Society of Sisters* (*supra*), but also as offensive to the liberty guaranteed by the First Amendment.

The Jehovah Witnesses' cases have given rise to sharpened perceptions of the nature of religious liberty. In that line of decisions religious liberty meets State police power in forthright collision. Because religious liberty

occupies a preferred position in our constitutional scheme, this Court has held that in such collisions Power must yield to Liberty except in the case when liberty collides with the special power of the State reasonably functioning as *parens patriae.*

If the bus law in New Jersey be deemed incidentally to extend public aid to denominational schools (as members of the class of non-profit private schools), it is worthy of note that the case becomes one where State power and the religious and parental liberties of the citizen are not in opposition to one another. On the contrary this is an instance where the State lends its efforts to facilitate the exercise of these acknowledged and precious liberties. Is it then not true to say that non-discriminatory treatment of such schools by a State Legislature far from coming within the orbit of constitutional suspicion is a measure constitutionally worthy of affirmative Federal approbation?

When this cause is submitted to dispassionate judgment and dispassionate judgment alone remains actively functioning perhaps the whole substance of a sound approach to this and analogous questions is to be found in the following statement appearing in the report of the President's Advisory Committee on Education, February 1938, pp. 53-54 (Quoted by Moehlman, The American Constitutions and Religion, pp. 140-141):

> "Consideration should be given, however, to the fact that large numbers of children receive instruction in non-public schools and that the maintenance of schools under non-public auspices results in a significant reduction in public expense.
>
> Many of the services of public schools should be available to children regardless of whether they are enrolled in public schools for instruction. It is therefore recommended that such portions of the general aid as may be allocated in the joint plans to the

purchase of reading materials, transportation and scholarships be made available so far as Federal legislation is concerned for the benefit of pupils both in public and in non-public schools. The Committee also recommends that local public schools receiving Federal aid be authorized to make their health and welfare services available to pupils in non-public schools. The conditions under which health and welfare services and aid for reading materials, transportation, and scholarships may be made available for pupils in privately controlled schools should be determined by the State, or by the local school jurisdiction receiving the grants if the States so determine."

POINT V

The "wall of separation" between church and state is not undermined, breached or cracked by this transportation law. Abandoning metaphor, if this law be deemed to aid parochial schools it nevertheless does not offend the First Amendment because that amendment though negativing a state church and coercive activity directed against conscience does not deny to the forty-eight States power to serve their own legitimate educational interests in their citizens as citizens.

The appellant's argument in this respect takes the following essential form: The police power of the State must give way when it collides with specific constitutional limitations to be found in the Fourteenth and First Amendments to the Constitution. But it is contended that the New Jersey statute collides with the First Amendment. It is said to do so because it gives aid and support to denominational schools where religion, as well as other subjects, is taught. This is considered non-permissible aid because it is regarded as contravening the principle of absolute separation of Church and State as embodied in the First Amendment.

It is evident that underlying this argument is a theory of the meaning of the First Amendment. This theory in substance asserts that the State has neither power to enact any law prohibiting the free exercise of religion nor power to make any law in any way helpful to religion. Both restraint on religion and aid to it, the argument runs, go counter to the principle of separation of Church and State.

In more specific terms it is claimed that where aid is ordered to all school children and their parents regardless of whether they attend public or non-profit private schools such aid amounts to taxation for the support of religion in so far as parochial school parents and children are concerned. But it is said the First Amendment proscribes taxation which in any manner aids any religion. Therefore though the aid is not given in terms, is not given to parents of any particular religious denomination and is not given in order to aid religious organizations but is given by the State to promote its own interests in its own citizens such aid is said to be unconstitutional. It is the bare presence of religious teaching concomitant in some private schools with the secular training of the children which is ground for constitutional offense.

The Jeffersonian metaphor of a "wall of separation" between Church and State has validity. Like any metaphor, however, it must be closely analyzed in order that its true content may be revealed.

The "wall of separation" metaphor rightly understood does reflect definite ethical and social realities. In the first place in the United States all citizens are members of a single political community, but not all are members of a single religious community. This situation of fact must be met. To meet it there has been laid at the basis of constitutional policy a distinction in man himself between the civic person or citizen and the religious person or believer or perhaps, non-believer. The

citizen, in his totality as citizen, is wholly within the jurisdiction of the State and, apart from Constitutional limitations, is subject in all respects to its authority. As citizen he should enjoy all benefits of State action taken in behalf of citizens in the name of public welfare, public morality and the common public good.

The believer or non-believer as such is not within the jurisdiction of the State, is not subject to State authority (coercion) and must not be subject to pressure by reason of the legitimate exercise of his rights as believer or non-believer. State authority may properly coerce the civic conscience. The religious conscience, however, is immune from all State coercion. There is therefore a "wall" in a genuine sense of that expression that separates church and state. It is legitimately and necessarily erected between the distinct areas of the life of an individual, over which the authority of the State and the authority of conscience respectively rule.

As the State may not go beyond the wall with its coercion to compel the believer or non-believer in matters regarding his religious belief, his mode of worship and the like (and such is the substantial meaning of religious liberty) so too no church may go beyond the wall to use its authority to enforce conformity to its beliefs as the condition of full citizenship. Full citizenship is unrelated to religious belief or the absence of religious belief. Full citizenship is not to be conditioned on adoption of a particular church. Establishment of religion as understood at the time of adoption of the First Amendment and for many years thereafter actually made conformity to a particular church a condition of full citizenship. For example, it was originally the Colonial law of Virginia that baptism in the Episcopal Church was an essential element for initiation into full citizenship of that State.

The essential purpose of the "wall" of separation between Church and State as erected by the First Amend-

ment is to prevent the invasion of either area, civic or religious by non-competent authority (cf. *Chance v. Mississippi Textbook Rating and Publishing Board, supra*).

We are now in a position to see whether appellant has correctly located the "wall of separation" in respect of the present case, or whether he has been misled by the metaphor and has transformed the legitimate "wall" into an illegitimate "iron curtain" separating areas between which there should be free passage.

It is essential to observe that between 1791 and 1946 factual changes have taken place such that in 1946 the relevant body of facts states a problem for location of the wall which problem was non-existent in 1791. In seeking the outstanding new facts which furnish background to the present problem for locating the wall one readily finds them to be (1) the massive fact of the free American system of education with its two-fold component, public and non-profit private schools; and (2) the definitive assumption by the State as *parens patriae* of an increasingly active role in promoting general education as a principal factor in the general welfare.

The non-profit private school system is a *de jure* component of the American educational system. It has thousands of schools and millions of pupils. It did not slip into existence in some obscure corner of the Nation as something of questionable origins. Like the public school system it has moved over the years from small beginnings to large and important dimensions. It answers to the belief of an impressively large number of American citizens—parents who believe not on religious grounds alone but on grounds of public welfare as well—that education should not be divorced from formal religious instruction.

The non-profit private school exists in consequence of exercise by millions of parents of the parental right in respect of the education their children should receive. For large numbers religious schools fashion out the results of

religious belief on the one side and secular public welfare requirements on the other. The right of parents to have such beliefs, and having them to act to create religious schools is guaranteed to them by the Constitution.

The question now may be put this way: Does the exercise of parental choice in the matter of education necessarily "wall off" some citizens from participation in ordinary educational benefits decreed by the State in the discharge of its responsibility as *parens patriae*? The theory of the appellant is that when parental choice is exercised in the direction of a non-profit private school where religious instruction is given, such choice erects the "wall of separation".

The underlying argument to support this conclusion is that the parental decision to send a child to the non-profit private school is free in every respect. The freedom to choose a particular school is guaranteed against State interference by the First Amendment (and the Fourteenth); however, once this choice is made, appellant says that the State is powerless by reason of these Amendments to assist in carrying the burdens the choice imposes—burdens which are assumed by the State when another educational choice is made.

The appellant's theory and the arguments he uses to support it comprise (1) a distortion of the factual situation; (2) a denial to the State of the full range of its power *parens patriae*; (3) an effective frustration of the parental right in education, arising from a misunderstanding of the free American system of education and the rightful place in that system of religious and other non-profit schools; and (4) above all (and here one reaches the central fallacy) a distortion of the principle of separation of Church and State by the erection of a false "wall" not between Church and State but between the State and a large area of the State's own interests.

1. *Distortion of the factual situation.*—The decision of the parent to send a child to a non-profit private school is not free in every respect. Compulsory education laws oblige the parent to make a choice between schools. In making that choice, the conscience of the parent is not brought under State cognizance; the duty of the State to observe the distinction between the civic person and religious person obliges the State to disregard the religious or other motives which may determine the choice made by the parent. Hence, in the eyes of the State, when the choice is made, it is made under State compulsion. So far as the State may legitimately know the facts this decision (to send a child to a nonprofit private school) is made in obedience to a State law.

2. *Denial to the State of the true range of its power as parens patriae.*—But suppose, what is not the fact, that the choice were purely voluntary: it would still not have the effect attributed to it by appellant—that of forbidding the State to assist the parent who made it in carrying the burdens it imposes.

In the theory of appellant the State would say to such parent: "I recognize your right to a free choice of a school for your child; but if you make the choice of a private school, under religious auspices, mind the consequences: you will cut yourself off from me—I shall no longer be able to be *parens patriae* to you or to your child—I shall be forbidden to acknowledge your children as my children—I shall have to disown them; for the First Amendment, which forbids me to deny you this choice, also obliges me to deny you and your children my aid as *parens patriae.*"

This denial is cardinal to the appellant's position. The theme is education. Education here refers to the schooling of citizens under the disability of infancy. That disability does not vanish because a child attends a parochial school. Nor is he any less the citizen on that account.

His presence in such school in fact is not the outcome of his own significant choice. Practically speaking he has no choice in the matter.

When considering itself as *parens patriae*, the State may surely consider that it is *parens hujus patriae*—that it exercises its sovereignty in a particular set of conditions actually existing in this country. As a matter of fact the religious factor and the factor of parental right, free exercise of which is guaranteed by the Constitution, place millions of infant citizens in parochial schools for the sake of their education. For children thus situated the State surely is still *parens patriae*. The State may properly consider the factual condition so that its laws as framed and administered for the benefit of its infant citizens may provide for a flow of State aid equally to all children regardless of their religion.

3. *Frustration of parental right based on misunderstanding of the place of religious schools in the American system of education:* What appellant appears to ask is a definitive pronouncement that only a system of public education, erected and completely controlled by the State and devoid of all opportunity for religious education, has the right to public aid of any kind; his reason is basically that no other system of schooling is truly rooted in American life. But the Constitution does not say this. It contradicts this opinion. *Pierce* v. *Society of Sisters* (*supra*) was inspired by a different conception. Moreover history does not bear it out.* The results in citizenship flowing from the "religious" schools involve no consequences giving comfort to the idea that they merit a position of inferiority such that if a State chooses to aid them this Court must strike down such effort by the State to cultivate its own interests.

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* See Point II.

The assumption that religious schools are illegitimate in their origins is perhaps what leads appellant to regard these schools as existing by bare toleration. Contaminated in his eyes by religious instruction they must be deemed religious establishments, any aid to which means a penetration by the State of the "wall of separation." He would encumber their operation with burdens that are not to be laid on the operation of public schools. To give effect to any such conception lays the foundation for gradual destruction of a system of schools holding a high, worthy and indispensable place in American life.

4. *Erection of a false "wall" (or a wall in the wrong place).* Here is the heart of the falsity in appellant's theory. From the wall separating the sphere of the State's interest (all matters pertaining to the common temporal good) from the sphere of the church's interest (all matters affecting the forum of religious belief, etc.), he concludes to the existence of a wall between public schools and private schools including those under religious auspices. The falsity of the conclusion appears upon considering for a moment the peculiarity of the field of education. In this field the interests of the State and of the Church interpenetrate. Here no "wall" can be erected, dividing the educational field into two areas, with an impassable barrier between them, as if what went on in one area had nothing in common with what goes on in the other. As a matter of fact, the same fundamental enterprise goes on in both areas—the promotion of the general welfare through the preparation of an educated citizenry.

The interest of the State in running schools is the formation of men and women equipped for participation in the common tasks of this life. The Church shares this same interest; otherwise the Church would not run *schools*. The function of a school is essentially preparation for every day life; primarily, it cultivates the intel-

lectual virtues, to enable men to live as men—rational creatures, members of rational society. The fact that a parochial school does more than this—that it also recognizes man's transcendent destiny, and endeavors to help him achieve it—does not deprive it of the essential character of a school. Because it recognizes that man is a religious person as well as a civic person, it does not for that reason cease to educate him as a civic person, and by so doing to contribute to the general welfare.

If this be so, the State should not feel itself obliged to say to a portion of its citizenry: "If you choose to go to a parochial school, you go behind a wall, and I am forbidden to follow you with my aid, because what goes on behind that wall is not in my interest—the promotion of the public welfare—and therefore is of no interest to me. The only place where my interests are promoted is in the public school, and hence I shall aid it alone." This is a very arbitrary self-denying ordinance passed by the State upon itself—that it should erect a wall between itself and a whole area of public interest.

When a State raises no such false wall nothing in the Federal Constitution compels it to do so.

POINT VI

Conclusion

The judgment below should be affirmed because

(a) the challenged law, as authoritatively construed by the highest Court of New Jersey, serves a public purpose as an ingredient in a body of law operating to compel school attendance by minors. It is a law having no other relevant design or effect;

(b) the circumstance that the law affords aid to parents of parochial school children does not affect the matter, first, because the aid given is not given on denominational

grounds; second, because the aid supplied is to parents, children and the State altogether without regard to religious considerations; and third, because it is in the larger sense conducive to strengthening the total school system of the State, which comprises not only the common schools but also non-profit private schools; and

(c) finally because this law, if deemed to confer incidental benefits upon the non-profit private school system including denominational schools, does not on that account approach in the slightest manner the status of a law which infringes the rights of conscience (for it is not a discriminatory measure) nor is it a law which in the slightest degree amounts to an Act "respecting an establishment of religion".

Respectfully submitted,

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Appendix

Section 18: 14-8 of the Revised Statutes as amended by Chapter 191 of the Laws of 1941.

"18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"2. This act shall take effect July first, one thousand nine hundred and forty-one." (Amendment of 1941 in italics.)